

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

MICHAEL ROBERT HISCOX,

Petitioner,

vs.

MIKE MARTEL, Warden,

Respondent.

No. C 09-3477 PJH (PR)

**ORDER DENYING PETITION
FOR WRIT OF HABEAS
CORPUS AND GRANTING
CERTIFICATE OF
APPEALABILITY**

This is a habeas corpus case filed pro se by a state prisoner pursuant to 28 U.S.C. § 2254. The court ordered respondent to show cause why the writ should not be granted. Respondent filed an answer and a memorandum of points and authorities in support of it, and lodged exhibits with the court. Petitioner responded with a traverse. For the reasons set out below, the petition is denied.

BACKGROUND

On November 19, 2003, a jury found petitioner guilty on eleven counts of lewd and lascivious conduct, see Cal. Penal Code § 288(a). For each count the jury found true the allegations that the victim was under age 14 and that petitioner had substantial sexual conduct with the victim, see Cal. Penal Code § 1203.066 (8), and that petitioner committed the offenses against multiple victims, see Cal. Penal Code § 667.61(b)(c)(7) and (e)(5). Respondent's Exhibit ("Resp. Exh.") A2 at 565-576, 582-586. On January 12, 2004, the court sentenced petitioner to a total term of 165 years to life in prison, consisting of consecutive terms of 15 years to life on each count. Resp. Exh. A3 at 746-47, 751-53. On January 31, 2006, the California Court of Appeal affirmed the conviction but remanded for resentencing. Resp. Exh. F. A petition for review was denied by the California Supreme

1 Court on May 17, 2006, but before the California Supreme Court acted on the petition for
2 review, the superior court resentenced petitioner to a total term of 28 years. Resp. Exh. H
3 (Exhibit A).

4 On June 8, 2007, petitioner filed a habeas petition that was granted by the California
5 Court of Appeal,¹ and the case was remanded to the superior court for resentencing. *Id.* at
6 2. On October 25, 2007, the superior court again resentenced petitioner to a total term of
7 28 years, consisting of the aggravated term of eight years on count one, followed by two
8 years consecutive on each of the remaining ten counts. Resp. Exh. B3 at 60. On August
9 12, 2008, the Court of Appeal affirmed the judgment. Resp. Exh. O (appendix), *People v.*
10 *Hiscox*, 2008 WL 3414964 (Cal. App. 1 Dist.). The California Supreme Court denied a
11 petition for review on October 22, 2008. Resp. Exh. P. Petitioner filed a habeas corpus
12 petition in the California Court of Appeal that was summarily denied on February 13, 2009,
13 and a petition for review was summarily denied by the California Supreme Court on April
14 22, 2009. Resp. Exh. Q (Appendix), R.

15 The relevant facts, as described by the California Court of Appeal, can be
16 summarized as follows: Hiscox was convicted for sexually molesting three children over
17 the course of several years from 1992 through 1996. Resp. Exh. O at 1. The molestations
18 occurred while Hiscox was living with the children and their mother and acting as a father
19 figure for the children. *Id.* Hiscox was originally sentenced to serve a total term of 165
20 years in prison, but the case was remanded for resentencing under the law as it existed
21 prior to November 30, 1994. *Id.* at 2. The trial court resentenced Hiscox while a petition for
22 review was pending in the California Supreme Court. *Id.* The petition for review was
23 denied but, because the trial court resentenced Hiscox before it had regained jurisdiction of
24 the case, a habeas petition was granted by the Court of Appeal and the case was again
25 remanded to the trial court for resentencing. *Id.* On the second resentencing, Hiscox was
26 sentenced to a total term of 28 years, consisting of the aggravated term of eight years on

27 ¹The petition was granted because the superior court resentenced petitioner before it
28 had regained jurisdiction of the case.

1 count one, followed by consecutive two-year terms on the remaining counts. *Id.* The trial
2 court found that the aggravated term was appropriate on count one because Hiscox
3 assumed a fatherly role with the three victims and violated their trust and the trust of their
4 mother in gaining access to the victims. *Id.* at 3. The court found that two years, which
5 was one-third the midterm of six years, to be served consecutively, was appropriate for the
6 remaining counts. *Id.* The court acknowledged that Hiscox's lack of a prior criminal record
7 was a mitigating factor, but that the aggravating factor regarding his violation of trust after
8 assuming a fatherly role with the victims, outweighed the mitigating factor. *Id.*

9 STANDARD OF REVIEW

10 A district court may not grant a petition challenging a state conviction or sentence on
11 the basis of a claim that was reviewed on the merits in state court unless the state court's
12 adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an
13 unreasonable application of, clearly established Federal law, as determined by the
14 Supreme Court of the United States; or (2) resulted in a decision that was based on an
15 unreasonable determination of the facts in light of the evidence presented in the State court
16 proceeding." 28 U.S.C. § 2254(d). The first prong applies both to questions of law and to
17 mixed questions of law and fact, *see Williams (Terry) v. Taylor*, 529 U.S. 362, 407-09
18 (2000), while the second prong applies to decisions based on factual determinations, *See*
19 *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003).

20 A state court decision is "contrary to" Supreme Court authority, that is, falls under the
21 first clause of § 2254(d)(1), only if "the state court arrives at a conclusion opposite to that
22 reached by [the Supreme] Court on a question of law or if the state court decides a case
23 differently than [the Supreme] Court has on a set of materially indistinguishable facts."
24 *Williams (Terry)*, 529 U.S. at 412-13. A state court decision is an "unreasonable application
25 of" Supreme Court authority, falling under the second clause of § 2254(d)(1), if it correctly
26 identifies the governing legal principle from the Supreme Court's decisions but
27 "unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. The
28 federal court on habeas review may not issue the writ "simply because that court concludes

in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly.” *Id.* at 411. Rather, the application must be “objectively unreasonable” to support granting the writ. *Id.* at 409.

Under 28 U.S.C. § 2254(d)(2), a state court decision “based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding.” See *Miller-El*, 537 U.S. at 340; see also *Torres v. Prunty*, 223 F.3d 1103, 1107 (9th Cir. 2000).

When there is no reasoned opinion from the highest state court to consider the petitioner’s claims, the court looks to the last reasoned opinion. See *Ylst v. Nunnemaker*, 501 U.S. 797, 801-06 (1991); *Shackleford v. Hubbard*, 234 F.3d 1072, 1079, n. 2 (9th Cir. 2000). However, when presented with a state court decision that is unaccompanied by a rationale for its conclusions, a federal court must conduct an independent review of the record to determine whether the state-court decision is objectively unreasonable. See *Delgado v. Lewis*, 223 F.3d 976, 982 (9th Cir. 2000). This review is not a “de novo review of the constitutional issue;” rather, it is the only way a federal court can determine whether a state-court decision is objectively unreasonable where the state court is silent. See *Himes v. Thompson*, 336 F.3d 848, 853 (9th Cir. 2003). “[W]here a state court’s decision is unaccompanied by an explanation, the habeas petitioner’s burden still must be met by showing there was no reasonable basis for the state court to deny relief.” See *Harrington v. Richter*, 131 S. Ct. 770, 784 (2011).

DISCUSSION

As grounds for federal habeas relief, petitioner asserts that: (1) his due process rights were violated by admission of a confession obtained through coercion and promises of leniency; (2) his due process rights were violated when the trial court failed to allow testimony on the voluntariness of the confession; (3) the confession was not properly authenticated; (4) hearsay evidence was improperly admitted; (5) his arrest was improper; (6) the prosecutor committed misconduct; (7) the sentence imposed violated *Cunningham v. California*, 549 U.S. 270, 293-94 (2007); (8) his trial counsel was ineffective; and (9) his

appellate counsel was ineffective. Petition for Writ of Habeas Corpus ("Hab. Pet.") 6a-6d. The court dismissed claims (3) and (4) because both are state law claims and cannot form the basis for federal habeas relief, see *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (federal habeas unavailable for violations of state law or for alleged error in the interpretation or application of state law); and claim (5) because violations of the Fourth Amendment cannot be grounds for relief in a habeas proceeding. See *Stone v. Powell*, 428 U.S. 465, 481-82, 494 (1976) (no federal habeas review of Fourth Amendment claims unless state did not provide opportunity for full and fair litigation of those claims). Petitioner's remaining claims will be addressed on the merits.

I. Confession/Evidentiary Hearing

a. Confession

Petitioner claims that a confession he made during a pretext call with Theresa C. was improperly admitted because it resulted from promises of leniency. Hab. Pet. 1. The Court of Appeal summarized the telephone conversation as follows:

During the investigation of the crimes, Deputy Diana Freese asked Theresa C. to come to the sheriff's office and make a "pretext call" to Hiscox. The call was placed from Freese's office, and tape recorded, for the purpose of obtaining incriminating statements from Hiscox.

Theresa C. began by asking Hiscox about her three sons' report that he had molested them. She was particularly concerned about C., who was having psychological problems, and asked Hiscox to tell her specifically what he had done. After several denials, Hiscox said "I don't know what I can even talk to you about. Law Enforcement's already contacted me. They're investigating me." Hiscox remained noncommittal, and Theresa C. said, referring to C.: "Give me a f—ing break. He's embarrassed. He's humiliated. He feels like he's gonna be called a fagot (*sic*). I mean, Jesus Christ, you're their dad. It's time to f—ing pull it together and help them, you know, get over it. Screw Law Enforcement. We need to get this...I need my kids ok." Hiscox said, "I can't help them if they throw me in jail." Theresa C. replied: "Well, they're not gonna throw you in jail if you help them. F—them. We'll just get them out of the picture. I just need him to go to...I just need...I just need [C.] to be ok."

Hiscox remained reluctant. Theresa C. said: "It's just us. I don't want Social Services or anybody else in my life. I just want [C.] not to kill himself, ok." Hiscox commented, "I need not to go to jail, so I can help." A little later, the following exchange occurred:

"[Theresa C.] Well, they [the boys] haven't said anything yet. They don't have an appointment yet."

1 “H[iscox] They haven’t said anything to who yet? They
told...They called the Sheriff.”

2 “[Theresa C.] They talked to a Detective, which is an initial report.
3 They haven’t done...There’s like, I guess, there’s something called a
4 CAST screening or something. And they haven’t done that yet. I haven’t
talked to the Detective to make the determination. I haven’t been home
yet.”

5 “H[iscox] Mm hmm.”

6 “[Theresa C.] ...enough...Nobody’s gonna do anything unless I
7 want them to. And alls I want is for [C.] to be ok and for [D.] to be ok. I
know the Detective got called. I talked to him.”

8 Eventually, Hiscox began making admissions. He remained suspicious,
9 however, saying at one point “Theresa, I don’t know if you’re calling me
from the Police Station. I don’t know anything.” He also told Theresa C.,
10 “Theresa, everything I’m telling you, can send me to prison forever.”
Toward the end of the conversation, there was this exchange:

11 “H[iscox] Alls I know is I’ve told you now and you’re gonna
12 send me to jail with it. And I’m really sorry and I want to help [C.], but I
don’t know what to do.”

13 “[Theresa C.] Well...Oh, God.”

14 “H[iscox] But it’s all I can do to help you is to tell you so I did.”

15 Resp. Exh. F 3-4. (footnotes omitted).

16 On direct appeal petitioner argued that the trial court erred by granting the
17 prosecution’s motion to admit the tape of the phone call into evidence and denying his
18 motion to suppress the evidence. *Id.* at 4. The Court of Appeal concluded that the
19 statements were properly admitted, finding that Hiscox was not motivated to confess by an
20 implied promise of leniency made by Theresa C., but rather by a desire to help her and her
21 sons deal with the problems caused by his actions. *Id.* at 4-5. The court determined that
22 Hiscox knew that his statements exposed him to imprisonment, as he expressed concern
23 about the penal consequences of his admissions before, during, and after he made the
24 statements. *Id.* at 5. Under the circumstances, the Court of Appeal concluded that
25 Hiscox’s decision to confess was made voluntarily and was not coerced by an implied
26 promise of leniency. *Id.*

27 To be admissible, a confession must be “free and voluntary: that is, must not be
28

1 extracted by any sort of threats or violence, nor obtained by any direct or implied promises,
2 however slight, nor by the exertion of any improper influence.” See *Brady v. United States*,
3 397 U.S. 742, 753 (1970) (citation omitted). A court on direct review is required to
4 determine, in light of the totality of the circumstances, “whether a confession [was] made
5 freely, voluntarily and without compulsion or inducement of any sort.” See *Withrow v.*
6 *Williams*, 507 U.S. 680, 689 (1993). (internal quotation marks and citation omitted).

7 In cases involving psychological coercion, the question is whether, in light of the
8 totality of the circumstances, the defendant's will was overborne when he or she confessed.
9 See *Ortiz v. Uribe*, 671 F.3d 863, 869 (9th Circuit 2011). The interrogation techniques of
10 the officer must shock the conscience so as to warrant a federal intrusion into the criminal
11 processes of the States. See *Moran v. Burbine*, 475 U.S. 412, 433–34 (1986). Coercive
12 police activity is a necessary predicate to finding that a confession is involuntary within the
13 meaning of the Due Process Clause, and the state of mind of the police is irrelevant when
14 making this determination. See *Colorado v. Connelly*, 479 U.S. 157, 167 (1986); *Moran*,
15 475 U.S. at 423. However, police deception alone does not render a confession
16 involuntary. See *United States v. Miller*, 984 F.2d 1028, 1031 (9th Cir. 1993).

17 Petitioner contends that the confession made during the pretext call with Theresa C.
18 was involuntary because it was induced by promises of leniency and by warnings that her
19 son would inflict harm upon himself and petitioner if he did not comply with her demands for
20 information. Hab. Pet. 5-8.

21 Assuming *arguendo* that Theresa C. was acting as an agent of law enforcement
22 throughout the phone conversation, the totality of the circumstances indicate that
23 petitioner's will was not overborne when he confessed to the crimes. Theresa C. described
24 in great detail the pain that she and the boys were going through, and implored petitioner to
25 tell her what he had done so that she would at least know the source of their suffering.
26 Resp. Exh. A1 at 2-6. Although petitioner was reluctant to speak due to the criminal
27 investigation, he eventually succumbed to Theresa C.'s pleas for help, and admitted to
28 sexually molesting her boys on numerous occasions. It's clear that petitioner was moved

1 by her entreaties, even while being aware of the risk he was exposing himself to. *Id.* at 19.
2 Theresa C.'s so-called promises of leniency amounted to nothing more than proclamations
3 of how little she cared about the criminal investigation as compared to the well-being of her
4 children. *Id.* at 5-7. Although Theresa C. was acting in concert with the Sheriff's
5 Department, her statements and tone were that of a concerned mother, and not of a law
6 enforcement officer trying to overcome the will of the defendant through coercive or
7 deceptive means. It is clear from the record that petitioner's admissions arose out
8 of his desire to help Theresa C. and the children in whatever small way that he could, and
9 were not coerced by insincere promises of leniency or fabricated warnings of harm that
10 could befall the boys. In view of Theresa C.'s motives and her concern regarding the
11 effects of the abuse that the victims suffered at the hands of petitioner, the manner in which
12 she extracted information hardly "shocks the conscience" of this court. *See Moran*, 475
13 U.S. at 433-34. Petitioner fails to show that there was no reasonable basis for the state
14 court to deny relief. *See Harrington*, 131 S. Ct. at 784.

15 The California Court of Appeal's determination that petitioner's confession was
16 properly admitted was not contrary to, or an unreasonable application of, clearly
17 established federal law, or based on an unreasonable determination of the facts in light of
18 the state court record. *See* 28 U.S.C. § 2254(d).

19 b. Evidentiary Hearing

20 Petitioner contends that the trial court improperly denied his request for a testimonial
21 hearing to determine the admissibility of his confession. Hab. Pet. 15. The facts
22 surrounding this claim are as follows: A pretrial in limine hearing was held to address the
23 prosecution's motion to admit petitioner's confession and the defense motion to suppress
24 the same. Resp. Exh. B1 at 27-36. Based on its review of the parties' points and
25 authorities and an audiotape of the phone call, the court announced a tentative decision to
26 admit the confession. *Id.* at 27. Defense counsel argued that the court could not make an
27 informed decision on the tape's admissibility without allowing him to cross-examine
28 Theresa C. and Deputy Freese regarding the planning, training, and instructions involved in

1 preparing for the phone call. *Id.* at 27-35. Counsel tried to make the point that, because
2 Theresa C. acted as a government agent, she may have made improper threats or offers
3 that rendered the confession inadmissible. *Id.* The prosecution argued that the statements
4 were made voluntarily and as a result of the defendant's own conscience. *Id.* at 35-36.
5 The defendant was not in custody and made his confession at the end of a phone call
6 which he could have terminated at any time. *Id.* at 35. Theresa C. made no threats or
7 promises, and the defendant had no reason to believe that she had any legal authority over
8 him. *Id.* In fact, defendant repeatedly acknowledged that he could go to jail for his
9 statements depending on what she decided to do with the information. *Id.* After hearing the
10 arguments, the court found that, under the totality of the circumstances, the taped
11 statement was voluntary and admissible, and granted the prosecution's motion to admit the
12 confession and denied the defense motion to suppress the same. *Id.* at 36.

13 After the trial began, defense counsel renewed his objection to the admission of the
14 confession and requested a hearing pursuant to California Evidence Code § 402 to
15 determine whether Theresa C. made an offer of leniency to the defendant that rendered his
16 confession involuntary. Resp. Exh. B1 at 170-73. The court made it clear that it had
17 already reviewed the tape and the points and authorities submitted by the parties, and
18 would not be swayed by any further testimony. *Id.* at 173-74. Defense counsel argued that
19 Theresa C. clearly made an offer that induced petitioner's incriminating statements. *Id.* at
20 175-76. The court rejected the argument, finding that the statements were made voluntarily
21 under the totality of the circumstances, and denied the request for a § 402 hearing. *Id.* at
22 176-77.

23 A defendant is constitutionally entitled to have the trial court determine whether a
24 confession was freely and voluntarily given, and the trial judge's conclusion that the
25 confession is voluntary must appear from the record with unmistakable clarity. *See Sims v.*
26 *Georgia*, 385 U.S. 538, 543-44 (1967) *citing Jackson v. Denno*, 378 U.S. 368, 391-94
27 (1964).

28 Petitioner claims that the trial court's denial of his request for a testimonial hearing

1 prevented him from eliciting the material facts necessary for the court to make a proper
2 determination on whether his confession was voluntary. Hab. Pet. 17-19. This contention
3 lacks merit. Clearly established Supreme Court authority requires the trial court to
4 determine that the confession was freely and voluntarily given, and that its conclusion in
5 this regard appear from the record with unmistakable clarity. See *Sims*, 385 U.S. at 544.
6 This is precisely what happened here. After hearing argument, reviewing the audiotape
7 and considering the parties' points and authorities, the trial court made it clear that it had all
8 the facts necessary to determine that petitioner's statements were made voluntarily, and
9 that there was no need for additional testimony. Resp. Exh. B at 36, 173-74, 176-77.
10 Nothing more was required.

11 The trial court's determination that a testimonial hearing was not necessary was not
12 contrary to, or an unreasonable application of, clearly established federal law, or based on
13 an unreasonable determination of the facts in light of the state court proceedings. See 28
14 U.S.C. § 2254(d).

15 **II. Prosecutorial Misconduct**

16 Petitioner claims that the prosecutor committed misconduct by offering false
17 evidence, perjuring herself, suborning perjury, and misleading the court and defense
18 counsel. Hab. Pet. 49. The substance of petitioner's claim is that the prosecutor and
19 Deputy Freese did not truthfully identify the audiotape of the pretext call as accurate, and
20 they colluded to offer the false evidence as genuine without disclosing that information to
21 the court or to defense counsel. Hab. Pet. 52.

22 A conviction obtained through the use of testimony which the prosecutor knows or
23 should know is perjured must be set aside if there is any reasonable likelihood that the
24 testimony could have affected the judgment of the jury. See *United States v. Agurs*, 427
25 U.S. 97, 103 (1976). The result is the same when the prosecutor, although not soliciting
26 false evidence, allows it to go uncorrected when it appears. See *Napue v. Illinois*, 360 U.S.
27 264, 269 (1959). To prevail on a claim based on *Agurs/Napue*, the petitioner must show
28 that (1) the testimony (or evidence) was actually false, (2) the prosecution knew or should

1 have known that the testimony was actually false, and (3) that the false testimony was
2 material. See *United States v. Zuno–Arce*, 339 F.3d 886, 889 (9th Cir. 2003) (citation
3 omitted). In evaluating allegations of prosecutorial misconduct, this court considers
4 whether the prosecution's actions “so infected the trial with unfairness as to make the
5 resulting conviction a denial of due process.” See *Hein v. Sullivan*, 601 F.3d 897, 912 (9th
6 Cir. 2010). (citation omitted). The court must conduct an independent review of the record
7 to determine whether the California Supreme Court’s decision denying relief on this claim is
8 objectively unreasonable. See *Delgado*, 223 F.3d at 982.

9 Petitioner’s claim of falsity relies on the fact that the conversation was interrupted
10 due to the tape being turned over, leaving a small portion of the conversation that was not
11 recorded or transcribed. Petitioner’s Traverse (“Pet. Trav.”) at 46. Petitioner argues that
12 the prosecution, knowing of the interruption, sought to admit the tape as the “entire pretext
13 call with no deletions,” thereby offering false evidence and also suborning perjury of their
14 witness, Deputy Freese, who testified under oath as to the contents of the recording. *Id.*
15 Petitioner’s claim lacks merit as there is no showing that the prosecution deliberately
16 presented false evidence, or that anything material was omitted from the tape. Side one of
17 the tape ends in the middle of a statement from Theresa C. that she needs to know what
18 happened to her kids. Resp. Exh. A1 at 18. The tape picks up on side 2 with Theresa C.
19 stating that she is going to believe her children. *Id.* All parties were aware of the reason for
20 the interruption, and there is no indication that the portion of the conversation that was not
21 recorded concerned whether petitioner’s admissions were voluntary and reliable. *Id.*
22 Petitioner’s *Napue* claim therefore fails on the first prong as there was no false testimony
23 concerning the authenticity of the tape or its contents and, in any case, there is no
24 indication that the portion of the testimony that was not recorded had any material bearing
25 on an issue in dispute.

26 Based on the court’s independent review of the record, the state courts’ decision
27 denying petitioner’s claim for relief is not objectively unreasonable. See *Delgado*, 223 F.3d
28 at 982.

III. **Cunningham Claim**

Petitioner claims that the trial court's imposition of an upper term sentence on count one violated *Cunningham v. California*, 549 U.S. 270, 274, 288-290 (2007) because it was based on a factor not admitted to by him or found by a jury. Hab. Pet. 56. The jury found petitioner guilty on eleven counts of lewd and lascivious conduct in violation of California Penal Code § 288(a). At the second resentencing, the court found that the aggravated term of eight years was appropriate on count one, based on the fact that the defendant assumed a fatherly role with the three victims and violated their trust to commit the offense. Resp. Exh. B3 at 60. The Court of Appeal affirmed the sentence, finding that the trial court properly imposed the aggravated term under California's revised sentencing statute. Resp. Exh. O at 4.

In *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), the Supreme Court held that any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. In *Blakely v. Washington*, 542 U.S. 296, 303 (2004), the Supreme Court explained that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Id.* (emphasis in original). Therefore "the middle term prescribed in California's statutes, not the upper term, is the relevant statutory maximum." *See Cunningham v. California*, 549 U.S. 270, 288-89 (2007). In *Cunningham*, the Supreme Court, citing *Apprendi* and *Blakely*, held that California's Determinate Sentencing Law violates a defendant's right to a jury trial to the extent that it contravenes "*Apprendi's* bright-line rule: Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" *See id. quoting Apprendi*, 530 U.S. at 490.

The trial court's imposition of an upper term sentence on count one, based on facts found by the judge rather than the jury, constituted error under *Cunningham*, 549 U.S. at 288-89. However, failure to submit a sentencing factor to a jury is subject to harmless error

1 analysis. See *Butler v. Curry*, 528 F. 3d 624, 648 (9th Cir. 2008). In federal habeas
2 proceedings, the court must determine whether the error had a substantial and injurious
3 effect on petitioner's sentence under the standard set forth in *Brecht v. Abrahamson*, 507
4 U.S. 619 (1993). See *Hoffman v. Arave*, 236 F.3d 523, 540 (9th Cir. 2001). Applying this
5 standard the court must grant relief if there is "grave doubt" as to whether a jury would have
6 found the relevant aggravating factors beyond a reasonable doubt. See *O'Neal v.*
7 *McAninch*, 513 U.S. 432, 434, 445 (1995). Grave doubt exists when, "in the judge's mind,
8 the matter is so evenly balanced that he feels himself in virtual equipoise as to the
9 harmlessness of the error." *Id.* at 434.

10 At sentencing, the trial court heard argument from counsel and testimony from
11 petitioner, his brother, and Theresa C. Resp. Exh. B2 at 417-448. The court was
12 presented with extensive evidence that the victims endured ongoing and repeated
13 instances of sexual abuse at the hands of petitioner. *Id.* at 448. It was uncontested that
14 petitioner acted as a surrogate father for the three victims in that he provided significant
15 financial support for the victims and their mother, and the trial court concluded that
16 petitioner abused their trust in "one of the worst ways imaginable." *Id.* at 456. Based on
17 the evidence that was presented at trial and at the sentencing hearing, the *Cunningham*
18 error is harmless because there is virtually no doubt, let alone grave doubt, that a jury
19 would have concluded beyond a reasonable doubt that petitioner abused a position of trust
20 with respect to the three victims. See *Butler*, 528 F.3d at 643, 648–49.

21 **IV. Ineffective Assistance of Counsel**

22 Petitioner contends that his trial counsel was ineffective at sentencing for (i) failing to
23 draw the court's attention to its prior findings of mitigating factors; (ii) failing to insist that the
24 court state its reasons for imposing consecutive terms; and (iii) failing to object to the
25 court's finding that petitioner had the ability to pay fines and restitution. Hab. Pet. at 65.
26 Petitioner also contends that trial counsel was ineffective at both the preliminary hearing and
27 the trial for failing to object to the admission of the pretext call. Hab. Pet. 24. He finally
28 contends that his appellate counsel was ineffective for failing adequately to raise the

1 foregoing issues on appeal. Hab. Pet. 19, 24, 32, 45.

2 In order to succeed on an ineffective assistance of counsel claim, the petitioner must
3 satisfy the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668, 687
4 (1984), which requires him to show deficient performance and prejudice. Deficient
5 performance requires a showing that trial counsel's representation fell below an objective
6 standard of reasonableness as measured by prevailing professional norms. See *Wiggins*
7 *v. Smith*, 539 U.S. 510, 521 (2003). To establish prejudice, petitioner must show a
8 reasonable probability that "but for counsel's unprofessional errors, the result of the
9 proceeding would have been different." See *Strickland*, 466 U.S. at 694. If a petitioner
10 cannot establish that defense counsel's performance was deficient, it is unnecessary for a
11 federal court considering a habeas ineffective assistance claim to address the prejudice
12 prong of the *Strickland* test. See *Siripongs v. Calderon*, 133 F.3d 732, 737 (9th Cir. 1998).
13 Again, because the California Supreme Court summarily denied the petition with no
14 explanation, this court must conduct an independent review of the record to determine
15 whether its decision denying petitioner's claim of ineffective assistance of counsel is
16 objectively unreasonable. See *Delgado*, 223 F.3d at 982.

17 **a. Sentencing**

18 At the original sentencing hearing the defense submitted a "statement in mitigation
19 and sentencing with proposed sentencing alternatives." Resp. Exh. B2 at 456. The court
20 considered the statement, and also noted that petitioner had led a productive life and that
21 numerous letters of support were submitted on his behalf. *Id.* at 456-57. The court
22 sentenced petitioner to eleven consecutive terms of fifteen years to life, and ordered him to
23 pay a restitution fine of \$10,000, while suspending payment on an identical restitution fine.
24 *Id.* at 457. At the second resentencing, the court began by announcing a tentative decision
25 to sentence petitioner to a total term of 28 years. Resp. Exh. B3 at 55. The court went on
26 to find that petitioner's lack of a prior record was a mitigating factor, but determined that the
27 aggravating factors outweighed the mitigating ones. Resp. Exh. B3 at 57, 60. The court
28 sentenced petitioner to a total term of 28 years, consisting of 8 years on count one,

1 followed by consecutive term of 2 years on each of the remaining ten counts, and reduced
2 his restitution fine from \$10,000 to \$5,000. *Id.* at 60-61.

3 Petitioner claims that counsel was ineffective for not raising the prior mitigating
4 factors relied on by the trial court at the original sentencing proceeding, and for failing to
5 produce an updated pleading in mitigation. Hab. Pet. 68. Petitioner's claim lacks merit as
6 the record reflects that the court was aware of the mitigating factors in the case, but simply
7 concluded that the aggravating factors outweighed the mitigating ones. Resp. Exh. B3 at
8 57, 60. However, even assuming that counsel's failure to highlight the mitigating factors for
9 the court's benefit constitutes deficient performance, petitioner fails to show a reasonable
10 probability that the result of the proceeding would have been different had he done so. See
11 *Strickland*, 466 U.S. at 694. Considering the facts of this case, particularly the original
12 sentence imposed, it is highly unlikely, let alone reasonably probable, that petitioner would
13 have received a more favorable result had counsel produced an updated pleading that
14 refreshed the court's recollection regarding the mitigating factors it relied on at the original
15 sentencing.

16 Petitioner also contends that counsel was ineffective for failing to request that the
17 court state its reasons for imposing consecutive sentences. Hab. Pet. 72. The trial court
18 did not abuse its discretion by imposing consecutive sentences. See Cal. Rules of Court,
19 Rule 4.425. In any case, petitioner fails to demonstrate a reasonable possibility of a better
20 result had his counsel requested a statement of reasons justifying the imposition of
21 consecutive sentences. See *Strickland*, 466 U.S. at 694.

22 Petitioner's claim regarding trial counsel's failure to object to restitution does not
23 constitute deficient performance because California law requires the court to impose a
24 restitution fine unless it finds a compelling and extraordinary reason not to do so. See Cal.
25 Penal Code § 1202.4(b). A defendant's inability to pay is not a compelling and
26 extraordinary reason not to impose a restitution fine. *Id.* "Failure to raise a meritless
27 argument does not constitute ineffective assistance." See *Moormann v. Ryan*, 628 F.3d
28 1102, 1109-10 (9th Cir. 2010) quoting *Boag v. Raines*, 769 F.2d 1341, 1344 (9th Cir. 1985).

b. Preliminary Hearing/Trial

Petitioner was represented by different attorneys at the preliminary hearing and the trial, and contends that both were ineffective for failing to object to the admission of the audiotape of the pretext call on the basis that it was not properly authenticated. Hab. Pet. 24. Petitioner argues that Deputy Freese could only hear Theresa C's side of the conversation and therefore lacked personal knowledge to authenticate the contents of the entire recording. Hab. Pet. 28. Even though Deputy Freese heard only one side of the conversation, under California law his testimony was sufficient to authenticate the recording so long as he could identify the tape as the same one on which he recorded the conversation, and could testify that it was a complete recording of the conversation. See *People v. Estrada*, 93 Cal. App. 3d 76, 100 (Cal. App.1. Dist. 1979); see also California Evidence Code §§ 250, 1413. Moreover, the recording was admissible notwithstanding the interruption in the tape when it was being turned over, as there was no showing that material statements were missing from the conversation. Thus, any objection raised by counsel would have been futile, therefore counsel's failure to raise the argument does not constitute ineffective assistance. See *Moormann*, 628 F.3d at 1109-10 (citation omitted).

c. Appellate Counsel

Throughout his petition, petitioner argues that appellate counsel was ineffective for failing adequately to raise the foregoing issues on appeal. Hab. Pet. 19, 24, 32, 45.

The Due Process Clause of the Fourteenth Amendment guarantees a criminal defendant the effective assistance of counsel on his first appeal as of right. See *Evitts v. Lucey*, 469 U.S. 387, 391-405 (1985). Claims of ineffective assistance of appellate counsel are reviewed according to the standard set out in *Strickland v. Washington*, 466 U.S. 668 (1984). See *Miller v. Keeney*, 882 F.2d 1428, 1433 (9th Cir. 1989). Appellate counsel does not have a constitutional duty to raise every nonfrivolous issue requested by defendant. See *Jones v. Barnes*, 463 U.S. 745, 751-54 (1983). The weeding out of weaker issues is widely recognized as one of the hallmarks of effective appellate advocacy. *Id.* at 751-52.

1 For the reasons discussed, *supra*, petitioner was not denied the effective of
2 assistance of counsel during trial. Because the claims raised by petitioner lack merit,
3 appellate counsel's failure to raise them on appeal was neither deficient nor prejudicial
4 under the *Strickland* standard. See *Rhoades v. Henry*, 638 F.3d 1027, 1036 (9th Cir.
5 2011). Consequently, petitioner did not receive ineffective assistance of counsel on
6 appeal. The state court's decision denying relief on this claim was not objectively
7 unreasonable.

8 **d. Conclusion**

9 Based on the court's independent review of the record, the California Supreme
10 Court's decision denying petitioner's claims of ineffective assistance of counsel was not
11 objectively unreasonable. See *Delgado*, 223 F.3d at 982.

12 **V. Appealability**

13 The federal rules governing habeas cases brought by state prisoners require a
14 district court that denies a habeas petition to grant or deny a certificate of appealability
15 ("COA") in the ruling. See Rule 11(a), Rules Governing § 2254 Cases, 28 U.S.C. foll.
16 § 2254 (effective December 1, 2009).

17 To obtain a COA, petitioner must make "a substantial showing of the denial of a
18 constitutional right." 28 U.S.C. § 2253(c)(2). "Where a district court has rejected the
19 constitutional claims on the merits, the showing required to satisfy § 2253(c) is
20 straightforward: The petitioner must demonstrate that reasonable jurists would find the
21 district court's assessment of the constitutional claims debatable or wrong." See *Slack v.*
22 *McDaniel*, 529 U.S. 473, 484 (2000). Section 2253(c)(3) requires a court granting a COA
23 to indicate which issues satisfy the COA standard. Here, the court finds that two issues
24 presented by petitioner in his petition meet the above standard and accordingly GRANTS
25 the COA as to those issues. See generally *Miller-El*, 537 U.S. at 322.

26 The issues are:

27 (1) whether the trial court improperly admitted an audiotape of petitioner's
28 confession because the confession was coerced through an implied promise of leniency,

1 and;

2 (2) whether petitioner was entitled to a testimonial hearing to determine the
3 admissibility of his confession.

4 Accordingly, the clerk shall forward the file, including a copy of this order, to the
5 Court of Appeals. See Fed. R. App. P. 22(b); *United States v. Asrar*, 116 F.3d 1268, 1270
6 (9th Cir. 1997).

7 **CONCLUSION**

8 For the foregoing reasons, the petition for a writ of habeas corpus is **DENIED**.

9 A Certificate of Appealability is **GRANTED**. See Rule 11(a) of the Rules Governing
10 Section 2254 Cases.

11 The clerk shall close the file.

12 **IT IS SO ORDERED.**

13 Dated: March 13, 2013.

14 

PHYLLIS J. HAMILTON
United States District Judge

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